No. 83-185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SYLVIA COOPER, *ET AL.*,
Petitioners,
v.
FEDERAL RESERVE BANK OF RICHMOND

and

PHYLLIS BAXTER, *ET AL.*,
Petitioners,
v.
FEDERAL RESERVE BANK OF RICHMOND.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT FEDERAL RESERVE BANK OF RICHMOND

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QUESTION PRESENTED

Whether a judicial determination in a properly certified class action will bind a class member, not opting out after notice, in asserting thereafter an individual claim within the range of charges determined in the class suit.[1]

[1] The parties have stated the issue in this case in various ways. The statement above is that of the Fourth Circuit in its decision below. [P.A. 177a].

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ABBREVIATIONS

The following abbreviations are used in citation to various parts of the Record in this action:

"J.A." refers to the Joint Appendix filed in this Court

"P.A." refers to the Appendix to the Petition for Writ of Certiorari

"I C.A. App." refers to the Appendix in *EEOC and Cooper* in the court of appeals

"II C.A. App." refers to the Appendix in *Baxter* in the court of appeals

"Tr." refers to pages in the trial transcript in *EEOC and Cooper* which were not made part of the Appendix in that action in the court of appeals

"PX" refers to plaintiffs' exhibits in the trial record of *EEOC and Cooper*

"DX" refers to defendant's exhibits in the trial record of *EEOC and Cooper*

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

This action arises out of a race discrimination in employment class action, *EEOC and Sylvia Cooper, et al. v. Federal Reserve Bank of Richmond*. The action was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and pursuant to 42 U.S.C. § 1981. The Respondent is the Federal Reserve Bank of Richmond, Charlotte (North Carolina) Branch (hereinafter "the Bank"). At all times relevant to this action blacks represented over 30% of the Bank's workforce — fifty percent greater than their representation in the relevant external labor market (about 20%). [P.A. 118a]. Moreover, the Bank promoted blacks at a rate greater than their representation in its workforce and at a greater rate than whites were promoted. [P.A. 121a]. The final judgment on the merits of the class action was in favor of the Bank.

Petitioners in this court were the plaintiffs in *Baxter, et al. v. Federal Reserve Bank*. They are all former class members in the *EEOC and Cooper* class action. After an adverse ruling as to their sub-class by the district court in the *EEOC and Cooper* action, they filed individual claims in the subsequent *Baxter* action. The Fourth Circuit Court of Appeals held that those claims were barred by the judgment in favor of the Bank in the class action.

The *EEOC and Cooper* action was initiated by the EEOC in March 1977. The EEOC's Complaint alleged race discrimination in promotions in general and race and sex discrimination against Cooper in particular. [J.A. 6a]. Several months later Cooper and three others intervened in the EEOC's action for themselves and as representatives of the class of all present and former employees of the Federal Reserve Bank of Richmond, Charlotte Branch. The Complaint-in-Intervention alleged racial discrimination against the four class representatives and against the class in initial job assignment, training, pay, discipline and promotion in all job grades. [J.A. 12a]. The Bank did not oppose this intervention.

In April 1978, the class was certified by the district court pursuant to a Consent Order agreed upon by all the parties. [J.A. 24a]. By this Consent Order, the class represented by the Cooper intervenors was certified to include "all black persons who worked for the Federal Reserve Bank of Richmond at its Charlotte Branch Office at any

time since January 3, 1974." [J.A. 30a]. The EEOC was not certified as a class representative, but agreed that the scope of the persons for whom it sought relief for race discrimination was coextensive with the definition of the class represented by the Cooper intervenors. [J.A. 31a].

By the Consent Order the parties also agreed upon a Notice to be sent to class members. [J.A. 30a-31a]. The Notice advised class members of the class action, their membership in the class, their right to remain class members or to opt out of the class, and the consequences of each option. Specifically, the Notice advised class members that:

> If you decide to remain in this action, you should be advised that: the court will include you in the class in this action unless you request to be excluded from the class in writing; the judgment in this case, whether favorable or unfavorable to the plaintiff and the plaintiff-intervenors, will include all members of the class; all class members will be bound by judgment or other determination of this action. . . .

That Notice was received by each of the *Baxter* Petitioners. [J.A. 95a]. None of these Petitioners made any attempt to opt out of the class action.

After extensive discovery, the *EEOC and Cooper* class action was tried to the district court in September 1980. The trial of the class action was bifurcated upon consent of the parties. The major issue at the trial was alleged discrimination in promotions. Petitioners each testified at the trial in support of the class action about various promotions which they allegedly had been denied. But they never moved to intervene, even after the district court ruled that it would hear their testimony only on the class issues.

Shortly after the trial, the district court issued a "Memorandum of Decision." [P.A. 91a]. The Memorandum of Decision stated the district court's opinion that that the Bank had discriminated against two of the four individual claimants (Sylvia Cooper and Constance Russell) and in promotions out of Grades 4 and 5 only, but no relief relating to promotions out of Grades 6 and above was indicated.

Petitioners were employed in Grades 6 and above[2] and, therefore, were not members of the class which was awarded relief (*i.e.* blacks denied promotions out of Grades 4 and 5). Four months after the filing of the Memorandum of Decision, Petitioners sought to intervene in the class action. [J.A. 39a]. Intervention was denied. [P.A. 286a]. Petitioners then filed a separate action alleging individual claims of discrimination. [J.A. 63a]. The Bank moved to dismiss that action. [J.A. 71a]. The Motion was denied, but the district court certified the question for interlocutory appeal. [J.A. 96a]. The district court's Findings of Fact and Conclusions of Law in *EEOC and Cooper* were filed May 29, 1981. [P.A. 197a]. There the district court defined the class as it had in the Consent Order and concluded with respect to promotions in Grades 6 and above as follows:

> The Court concludes that there was no showing that the Bank had discriminated against black employees with respect to promotions out of Grades 6 and above, and that defendant did not violate Title VII or 42 U.S.C. §1981 with respect to promotions out of Grade 6 and above.

[P.A. 284a-285a].

The Bank appealed those portions of the *EEOC and Cooper* judgment that were adverse to it and also appealed the district court's refusal to dismiss the *Baxter* action. Neither the EEOC nor the plaintiff-class representatives appealed from the portions of the judgment adverse to them.

On appeal, the Fourth Circuit held in *EEOC and Cooper* that the district court's findings of discrimination against two of the named individuals and in promotions out of Grades 4 and 5 were clearly erroneous. [P.A. 2a-172a]. In *Baxter*, the Fourth Circuit held that the adverse judgment in the *EEOC and Cooper* class action barred the subsequent individual action. [P.A. 172-184a].

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[2] Petitioner Ruffin was actually a Grade 5 employee [P.A. 246a-247a], and thus at the time of the Motion to Intervene she was entitled to participate in Stage II of the class action.

SUMMARY OF ARGUMENT

I. The Fourth Circuit Court of Appeals properly ruled that Petitioners are bound by the adverse judgment in the prior class action. After notice of their right to pursue their claims individually or to be bound by the judgment in the class action, Petitioners elected to litigate their claims through the *Cooper* class representatives and the vehicle of the class action. Petitioners made no attempt to litigate their claims individually until after they learned that the judgment in the class action was adverse to them. Rather, they abided by their election and pursued their claims as class members in the class action through a decision on the merits. Consequently, they are bound by that election and the adverse judgment in the class action.

The class action included the claims of racial discrimination in promotions and resolved those claims against Petitioners' class. The fact that the class action was a "pattern and practice" action is immaterial to *res judicata* principles because "pattern and practice" is simply an alternative method of proof, not a separate and distinct cause of action. Petitioners' subsequent action involves the same cause of action that was resolved in the prior class action. So, it was properly barred by the doctrine of *res judicata*.

The language and intent of Fed. R. Civ. P. 23 also requires that the subsequent action be dismissed. The class action is specifically designed for the adjudication in one action of "individual claims" which are typical of one another and involve common questions of law or fact. In fact, a class action is nothing but the aggregation of the "individual claims" of class members. Here, the district court found — upon Petitioners' consent — that the class action was superior to other available methods for fair and efficient adjudication of the controversy. Consequently, the action was certified as a class action pursuant to Rules 23(b) (2) and (b) (3). This Court noted in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 547-48 (1974), that Rule 23 was specifically amended in 1966 to bind class members to the judgment in a class action and to prevent such fence-sitting or "one-way intervention" as Petitioners attempt here.

The practical effect of the rule suggested by Petitioners would destroy Rule 23 and the class action as a litigation vehicle. If these Petitioners were permitted to file subsequent actions, then so could

all the 300 or so other class members. That would result in the Bank — after prevailing on the merits in the class action — having to defend multiple subsequent actions by former class members. Petitioners seek a rule that would permit them to participate in the class action and: (i) if they prevailed, obtain a presumption in their favor; and (ii) if they lost in the class action, nonetheless maintain a subsequent action on their "individual claims." Petitioners' submission is, in effect, that a class action amounts to a "no lose" proceeding for class members and a "no win" proceeding for the defendant. Such a result would render Rule 23 and the class action meaningless.

Finally, there are many benefits that a class member receives by litigating his claims in the class action — an increased chance of success and economies of scale resulting from pooled resources. But, those benefits are not totally one-sided. They involve a trade-off borne of judicial economy. That is, if the class action device is to succeed in avoiding needless multiplicity of suits and to permit adjudication of numerous claims in one suit, the judgment in the class action must be binding on class members.

II. The district court did not expressly reserve Petitioners' subsequent actions in ruling on their post-trial Motion to Intervene. At most, the district court stated an opinion that Petitioners could file a subsequent action — an erroneous opinion which was reversed by the Fourth Circuit. Moreover, at the time of Petitioners' Motion to Intervene in *EEOC and Cooper* and the district court's statements, the court had already ruled against Petitioners' class, so the Bank was then entitled to a judgment against Petitioners.

III. Petitioner Harrison was actually a Grade 6 employee and not a Grade 3 as mistakenly noted by both courts below. Consequently, his position is no different than that of the other Petitioners.

IV. The rule that this Court should adopt is that: a properly certified class action is made up of the "individual claims" of class members, and those class members who, after notice, elect to litigate their claims in the class action are thereafter precluded from re-litigating individual claims within the range of issues determined in the class action. Consequently, the decision of the Court of Appeals for the Fourth Circuit should be affirmed.

ARGUMENT

I. The Fourth Circuit Properly Ruled That Petitioners Are Bound By The Adverse Judgment In The Prior Class Action

The Bank submits that *res judicata* bars Petitioners' claims in the subsequent *Baxter* action. Petitioners knowingly elected to litigate their "individual claims" of discrimination through the vehicle of the *EEOC and Cooper* class action. They are therefore bound by the judgment in that action and precluded from pursuing the claims which they attempt to re-litigate in this subsequent action. Their subsequent action is also barred by the language and intent of Fed. R. Civ. P. 23. Binding Petitioners to their election is particularly appropriate here because they are classic "fence sitters" who seek in the *Baxter* action a second chance to litigate their claims. Finally, the practical effect of Petitioners' submission would be to render Rule 23 and the class action meaningless.

1. *Res Judicata*

The doctrine of *res judicata* provides that a "final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action." *Federated Department Stores v. Moitie*, 452 U.S. 394, 398 (1981); *see also Nevada v. United States*, 77 L. Ed. 2d 509 (1983); *Allen v. McCurry*, 448 U.S. 90 (1980). Whether Petitioners' claims are barred by *res judicata* turns on whether the cause of action asserted in the *EEOC and Cooper* class action was the "same cause of action" that Petitioners seek to assert here. *Nevada v. United States*, 77 L. Ed. 2d at 525.

The test for whether a subsequent action is barred by *res judicata* does not center on the *evidence* presented. Rather, it focuses on the violation of a *right* which the evidence shows. This Court has stated the analysis as follows:

> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination,

> is *the violation of but one right by a single legal wrong*. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action.

Balto. Steamship Co. v. Phillips, 274 U.S. 316, 321 (1927) (Emphasis added), *cited with approval, Nevada v. United States*, 77 L. Ed. 2d at 525 n.12.

In the present case, the individual claims of each Petitioner stated in their Complaint relate solely to their failure to receive certain promotions. [J.A. 65a-66a]. The denial of these promotions is precisely what each Petitioner previously testified about in the trial of the class action. [1 C.A. App. 452-688]. Similarly, the violation of the *right* is the same as in the prior class action — alleged denial of promotions because of their race. That is precisely the "right" that was litigated in the *EEOC and Cooper* class action and resolved against Petitioners. Consequently, this subsequent action is barred by principles of *res judicata* and the binding effect of the class action judgment.

Petitioners concede that a class action judgment on the merits of an issue precludes re-litigation of that issue. But, they attempt to escape that principle by asserting that the *EEOC and Cooper* class action did not include the individual claims of Petitioners. The Bank submits that: (a) the pattern and practice issue in the class action encompassed Petitioners' individual claims and, thus, their subsequent action involved the "same cause of action" and is barred by *res judicata*; and (b) the prior class action involved the issue of discrimination in promotions and concluded in the district court with a determination that the Bank had not discriminated against Petitioners' class in promotions.

a. *The "Same Cause of Action"*

A class member's "individual claims" are encompassed in the class action and thus represent the "same cause of action" and may not be re-litigated.

Several circuit court decisions have established this rule. In *Kemp v. Birmingham News Co.*, 608 F.2d 1049 (5th Cir. 1979), the plaintiff sought to raise personal claims for harassment and demotion

in an individual action after entry of a consent decree in a class action in which he was a non-named class member. The Fifth Circuit held the plaintiff bound by the class action decree. There the issues in the class action involved a "system" of "limiting the employment and promotional opportunity" of class members. 608 F.2d at 1052. The Fifth Circuit noted that since the plaintiff's claims arose prior to entry of the judgment in the class action and "were or could have been brought" before the court in the class action, the *same cause of action* was involved and the plaintiff was bound by the prior class action decree. 608 F.2d at 1053.

A companion case, *Fowler v. Birmingham News Co.*, 608 F.2d 1055 (5th Cir. 1979), confirms *Kemp*, but also adds an additional feature. Like Petitioners, Fowler complained that he had been denied promotions and passed over for supervisory positions. Also similar to this case, Fowler was not entitled by the class action decree to all of the relief that other class members had obtained. Nevertheless, his personal claims were barred by the prior class action decree because they were within the scope of the general issues resolved in the class action.

The Ninth Circuit has also followed *Kemp* in affirming the dismissal of a plaintiff's claims arising from incidents that occurred prior to settlement of a class action in which the plaintiff has been a class member. *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981). There, the plaintiff's personal claims of denial of promotions were barred by the decree in the prior class action which settled the issue of classwide denial of "employment opportunities." But, other claims of retaliation that were not part of the classwide allegations in the prior class action were not dismissed. 656 F.2d at 1298-99.

The Fourth Circuit has also recognized this principle in two decisions preceding this case: *Woodson v. Fulton*, 614 F.2d 940 (4th Cir. 1980) (class action consent decree involving issues of discrimination in hiring, discipline and promotion barred class member's subsequent individual action on issues of his personal discrimination discipline and hindrance of advancement, but not his claim relating

to discharge not included in the class action); *Dalton v. Employment Security Comm'n*, 671 F.2d 835 (4th Cir.), *cert. denied*, 74 L. Ed. 2d 117 (1982), (consent decree barred subsequent individual action on issues subject to the decree).[3]

Dicta in *Dickerson v. United States Steel Corp.*, 582 F.2d 827 (3d Cir. 1978), states that class members in an unsuccessful class action *may* re-litigate their personal claims in a subsequent individual action. That decision is directly contrary to *Woodson, Dalton, Kemp, Fowler* and *Dosier*,[4] and by implication has been tacitly rejected by those decisions which occurred subsequent to its publication. Moreover, as the Fourth Circuit noted here, the *dicta* in Dickerson was subsequently rejected by the Third Circuit *en banc* in *Croker v. Boeing Co.*, 662 F.2d 975, 997 (3d Cir. 1981). There the

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[3] The EEOC contends that this line of decisions merely "effectuate[s] the salutary policy against double recovery." [EEOC Br. at 12 n.14]. In fact, *Kemp, Fowler, Dosier, Woodson* and *Dalton* make no mention of the prospect of "double recovery." Rather, each decision held that the doctrine of *res judicata* barred class members' subsequent claims and that the class action involved the same cause of action raised by a class member in a subsequent suit. *See, e.g., Woodson*, 614 F.2d at 941-42; *Kemp*, 608 F.2d at 1052-53; *Dosier*, 656 F.2d at 1298-99.

[4] Petitioners cite several cases as also being contrary to the cases discussed above. Each case involves a defect not present here and is distinguishable from the cases discussed above: In *Bogard v. Cook*, 586 F.2d 399, 408 (5th Cir. 1978), a subsequent individual action was permitted because it alleged acts directed at the plaintiff *after* the record in the class action had been closed and it sought damages for specific acts of physical abuse which were not included in the prior class action and which sought only equitable relief from general prison conditions. In *Marshall v. Kirkland*, 602 F.2d 1282, 1298 (8th Cir. 1979), a subsequent action was permitted because there had been no notice to class members regarding the class action. Finally, in *Eastland v. T.V.A.*, 704 F.2d 613, *modified in part*, 714 F.2d 1066 (11th Cir. 1983), involved only consolidation for trial with the class action of the individual claim of a purported class representative who had been found not to be an adequate class representative.

court dismissed as barred by *res judicata* two individual claims "because they were not named plaintiffs but rather were class-member witnesses whose class-wide claims had been unsuccessful" in the earlier class action (just as Petitioners here).[5]

The EEOC and Petitioners contend that a "pattern and practice" claim of discrimination is a different cause of action than an individual suit under Title VII or 42 U.S.C. § 1981. In fact these are no more than two methods of proving the same fact: whether a particular employment decision was racially premised. *Teamsters v. United States*, 431 U.S. 324, 335 (1977). In *Teamsters* this Court rejected the assertion that a Title VII plaintiff could carry the burden of proof only by presenting evidence according to the standards of *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), and stated that "'[t]he facts necessarily will vary in Title VII cases, and the specifications ... of the *prima facie* proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations.'" *Teamsters*, 431 U.S. at 358, *citing McDonnell-Douglas*, 411 U.S. at 802 n.13. Accordingly, the bifurcated trial of "pattern and practice" discrimination merely "illustrates *another means* by which a Title VII plaintiff's initial burden of proof can be met." *Teamsters*, 431 U.S. at 359 (Emphasis added). Simply because a "pattern and practice" method of proof differs from the elements of a *McDonnell-Douglas* method of proof does not create two causes of action. The injury alleged is the same, the statutes under which the cause of action arises are identical, and the ultimate issue adjudicated by the court does not differ, regardless of the method of proof.

In fact, a "pattern and practice" class action is by its nature an aggregation of the "individual claims" of each of the class members. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980). In a private class action there is nothing involved *but*

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[5] In *Edwards v. Boeing-Vertol Co.*, 717 F.2d 761 (3d Cir. 1983), a panel of the Third Circuit permitted a subsequent action by an unsuccessful class member under principles of tolling. A Petition for Certiorari is presently pending in this Court in that case.

individual claims. A class action is not a separate cause of action itself. Without the individual claims there would be nothing to litigate in the class action. This is particularly true in a disparate treatment action which alleges a "pattern and practice" of discrimination, such as this case. Such an action attempts to show that discrimination is "the regular rather than the unusual practice." *Teamsters v. United States*, 431 U.S. at 336. So, the "pattern and practice" attempted to be demonstrated consists of an aggregation of separate, distinct promotion decisions involving numerous individuals — not an additional substantive cause of action.

The incongruity of the Petitioners' position is easily demonstrated. Under Title VII and 42 U.S.C. § 1981, an individual plaintiff can carry his burden of proof of discrimination either by demonstrating that the employer engaged in a "pattern and practice" of discrimination or by introducing evidence in accordance with the pattern of *McDonnell-Douglas* and its progeny. *Teamsters*, 431 U.S. at 359. A Title VII plaintiff who filed an individual action alleging a pattern and practice of discrimination, of which he was a victim, would surely be bound by an adverse determination in his individual suit. He would not be able to file a second lawsuit that alleged again that he had been discriminated against, but that this time his evidence would be presented in accordance with the pattern of *McDonnell-Douglas*. An individual possesses only one cause of action under Title VII and 42 U.S.C. § 1981, but he has two different ways of proving his cause of action. *Teamsters v. United States*, 431 U.S. at 359; *see also*, *Coe v. Yellow Freight Systems, Inc.*, 646 F.2d 444, 449 n. 1 (10th Cir. 1981). He may decide to pursue one method of proof rather than the other, but he cannot splinter his cause of action into different lawsuits and continue to attempt to prove the same injury under different theories in different lawsuits.

This conclusion does not change simply because a Title VII plaintiff has pursued a pattern and practice claim as a class member of a class action suit. The mere fact that he was a member of a class action which litigated a "pattern and practice" action does not splinter his cause of action into two causes of action, one for a "pattern and practice" and one for individual acts of discrimination pursuant to the pattern of *McDonnell-Douglas*.

Thus, an individual's cause of action for racial discrimination is procedurally indistinguishable for *res judicata* purposes from a classwide cause of action for discrimination. Both the individual and class claims vindicate the same right and focus on the same issue: whether the employer has discriminated against an employee on the basis of race.[6]

Here, there can be little doubt that these Petitioners' promotion claims were encompassed within the allegations of classwide discrimination in promotions in the class action. Their claims stated in their Complaint in the *Baxter* action [J.A. 63a] relate to the denial of various promotions to each Petitioner. Denial of promotions was the primary issue litigated and decided in the class action. Virtually all of the trial in *EEOC and Cooper* was directed to the promotion issue. Plaintiffs offered over fifty statistical exhibits directed to the promotion issue. [PX 34-37, 34a-37a, 114a-114tt]. Moreover, Petitioners each testified at the trial in support of the class action, and their testimony concerned the denial of the very promotions they now allege in the *Baxter* Complaint.[7] This class action clearly litigated and decided the issue of discrimination in promotions. Consequently, the subsequent *Baxter* action involves the "same cause of action" decided in the *EEOC and Cooper* class action. So, relitigation of the "individual claims" is barred by *res judicata*.

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[6] Although the issue presented here happens to arise in a discrimination suit, it is not peculiar to that type of action. The issue here is of general procedural applicability. It would be present in antitrust, securities, and consumer class actions — in fact, it would be present in *any* class action.

[7] Petitioners' reliance on the district court's Findings relating to their testimony [Pet. Br. 39] is misplaced. Those "findings" were prepared by plaintiffs' counsel and adopted by the district court apparently without critical review. [P.A. 13a-24a]. Therefore, they suffer the same flaw as other such Findings criticized by the Fourth Circuit and found to be clearly erroneous. In fact, their "findings" are merely a summary of Petitioners' assertions and they completely ignore the ample rebuttal evidence offered by the Bank.

b. *The Decision of the District Court*

Petitioners contend that the judgment of the district court did not include their claims. They focus on the district court's informal "Memorandum of Decision," but ignore the other parts of the Record which define the scope of the class action — the class certification Consent Order, the Notice and the Findings of Fact and Conclusions of Law finally entered by the district court and incorporated into the Judgment.

The Consent Order certifying the *EEOC and Cooper* class demonstrates that both classwide as well as individual issues of discrimination were being adjudicated. There, the district court explicitly found that: "there are common questions of law and fact involved"; "the claims and defenses... are typical of the claims and defenses of the class..."; "the plaintiff-intervenors will adequately protect the interest of the class they seek to represent..."; and "questions of law or fact common to the members of the class predominate over any questions affecting only individual members...." [J.A. 28a-29a]. Such findings would have been unnecessary if "individual claims" of discrimination were not in issue.

Similarly, the district court defined the class to include all black employees employed by the Bank "*who have been discriminated against* because of their race in promotions, training, wages, discipline and discharge." [J.A. 53a ¶1 (Emphasis added)]. The Notice mailed to class members informed Petitioners of their right "to pursue in this action *any* claim of racial discrimination in employment that you may have against the defendant." [J.A. 35a-37a (Emphasis added)]. Neither the class certification Consent Order, the Notice to class members, nor the final definition of the class limited the cause of action in the *EEOC and Cooper* action to a "pattern and practice" claim. On the contrary, the district court defined both the class and the class issues in broad, across-the-board terms.

The Findings of Fact and Conclusions of Law also demonstrate that the claims of Petitioners and their class were *actually decided* in the class action. Petitioners continually point out that the district court's "Memorandum of Decision" stated merely that the court did

not find a pattern of discrimination in Grades 6 and above "pervasive enough" to order relief. [Pet. Br. 16; EEOC Br. 15]. But, Petitioners completely ignore the Findings of Fact and Conclusions of Law subsequently entered by the district court which, contrary to their counsel's proposal, clearly decided "*that defendant did not violate Title VII or 42 U.S.C. §1981 with respect to promotions out of Grade 6 and above.*" [P.A. 285a (Emphasis added)].

The significance of that conclusion is highlighted by the fact that Petitioners' counsel sought a quite different conclusion. The Memorandum of Decision directed Petitioners' counsel to prepare proposed Findings of Fact and Conclusions of Law. Petitioners' counsel proposed on this point that the district court *decertify the class* as to employees in Grades 6 and above and proposed the following conclusion:

> 27. Plaintiffs called several individual witnesses at the trial, some within the class as originally defined and some within the class as modified. *The court expresses no position* at this stage as to the entitlement to relief of the witnesses outside the modified class [the present Petitioners]....[8]

[Proposed Findings of Fact and Conclusions of Law (Emphasis added)]. Contrary to the suggestion that "no position" be expressed as to the entitlement to relief of these very Petitioners (who were "the witnesses outside the modified class"), the district court entered a decision that the Bank had not discriminated against those class

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[8] The proposed Findings were included in the Record in the Fourth Circuit, but not in the Joint Appendices there or in this Court. The proposal for certification of a class that included only Grade 4 and 5 employees and the proposed expression of no position on the claims of Petitioners appear at pages 28 and 39 of the Proposed Findings of Fact and Conclusions of Law.

members. The district court's conclusion adopted in lieu of Petitioners' counsel's proposal was that:

> 27. The Court concludes that there was no showing that the bank had discriminated against black employees with respect to promotions out of Grades 6 and above, and *that defendant did not violate Title VII or 42 U.S.C. §1981 with respect to promotions out of Grade 6 and above*.

[P.A. 285a (Emphasis added)]. This decision by the district court is made even more important by the fact that it is the only significant change to the proposed Findings that the district court made — all other changes were merely grammatical.[9]

As Petitioners suggest, it is important to focus on the "actual language of the judgment" [Pet. Br. 24] to ascertain the scope of the decision. Here, the district court's decision was not limited to "pattern" or "class" issues. Rather, the "actual language of the judgment" stated the affirmative conclusion that the Bank "did not violate Title VII or 42 U.S.C. § 1981 with respect to promotions out of Grade 6 and above." [P.A. 285a].[10] Furthermore, Petitioners did not appeal this conclusion.

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[9] A "marked" copy of the Findings which shows all changes from the proposed to the finally adopted Findings was submitted to the Fourth Circuit following oral argument below, and was included in the Record there. The Court of Appeals was highly critical of the district court's virtual verbatim adoption of Petitioners' counsel's proposed Findings. [*See* P.A. 13a-24a.] Petitioners sought certiorari on that issue, but it was not granted.

[10] The formal "Judgment" filed contemporaneously with the Findings of Fact and Conclusions of Law makes no specific mention of Grades 6 and above (other than by implication), but the Judgment does specifically state that it is based on those Findings of Fact and Conclusions of Law. The Judgment makes no mention of the Memorandum of Decision.

In summary, the Consent Order certifying the class action included Petitioners' claims in the class action. In the Findings of Fact and Conclusions of Law, the district court *rejected* the proposal to "express no position" on Petitioners' claims and instead concluded affirmatively that the Bank did not discriminate in promotions out of Petitioners' job Grades. So, the "actual language" of the district court expressly demonstrates an adverse decision on the merits of Petitioners' claims. The doctrine of *res judicata* now bars Petitioners from re-litigating those claims.

2. *Rule 23 Bars Petitioners' Claims*

By participating as class members in the *EEOC and Cooper* class action, Petitioners elected to litigate their claims of discrimination against the Bank through the *Cooper* class representatives. Rule 23 requires that Petitioners be bound by the judgment entered in that action. Indeed, Petitioners' attempt to file individual claims only after the district court indicated it would rule against Petitioners in the class suit is precisely the type of "one-way intervention" which Rule 23 does not permit. Plus, the practical effect of Petitioners' assertion would be to render Rule 23 and the class action meaningless.

a. *The Language and Intent of Rule 23*

The very language of Fed. R. Civ. P. 23 precludes subsequent actions by class members following their participation in an unsuccessful class action. Rule 23(c)(3) provides that:

> The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), *whether or not favorable to the class*, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), *whether or not favorable to the class*, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

Fed. R. Civ. P. 23(c)(3) (Emphasis added). Thus, Rule 23 requires that class members be bound by an adverse judgment.

Rule 23 is designed to avoid a "needless multiplicity of suits" and to permit the adjudication of numerous claims in one proceeding. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (1974); *Crown, Cork & Seal Co. v. Parker*, 76 L. Ed. 2d 628, 634 (1983). To avoid the impracticalities of joining numerous parties, a class action is litigated through class representatives and their counsel. In *EEOC and Cooper* Petitioners elected not to pursue their claims individually, but instead chose to rely on the class representatives.[11] Rule 23 is designed to *adjudicate* the claims of class members in the one action. *General Telephone Co. v. Falcon*, 457 U.S. 147, 155 (1982). It does not permit class members to sit on the fence awaiting judgment in the class action and then to pursue a subsequent "individual" action if the result is not to their liking — as Petitioners seek to do here.

Rule 23 was amended in 1966 to prevent the very procedure which Petitioners seek here. Prior to 1966, Rule 23 provided no means for establishing, prior to the entry of a final judgment, which persons were class members and would be bound by the judgment. *American Pipe & Construction Co. v. Utah*, 414 U.S. at 545-46. Under the present version of Rule 23, however, a class member may not await the outcome of the trial in the class action, and then decide whether to pursue the same course of action in another proceeding. In *American Pipe*, 414 U.S. at 547-49, this Court noted that the 1966 amendments to Rule 23 were specifically intended to cure the former procedures permitting class members to await developments in the trial "or even final judgment" before deciding whether to opt out as class members. This Court stated that, as presently written, Rule 23 requires that:

> potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation 'as soon as practicable after the commencement' of the action.... Thereafter they are either non-

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[11] Petitioners have not asserted that their representation in the class action was inadequate.

> parties to the suit and ineligible to participate in a recovery or to be bound by the judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse.

414 U.S. at 548-49.

After electing to litigate their claims in the class action, Petitioners now seek to avoid the judgment in that action and gain a second chance to re-litigate those claims. That is precisely what Rule 23 was amended to prevent.

b. *Petitioners' Election*

Petitioners correctly state several principles: The fact that an employer's workforce is racially balanced does not immunize an employer from liability for specific acts of discrimination, *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); an employer's "bottom line" in promotions is not an affirmative defense to a claim of particular acts of discrimination, *Connecticut v. Teal*, 457 U.S. 440 (1982); conversely, the existence of an individual act of discrimination does not require an inference that such treatment is typical of an employer's practices, *General Telephone Co. v. Falcon*, 457 U.S. at 157-58; and the fact that there is no showing of a "pattern and practice" of discrimination does not require the conclusion that there may not have been isolated or sporadic individual acts of discrimination, *Teamsters v. United States*, 431 U.S. at 336. [Pet. Br. 43-45]. All of those principles are true, but they are principles of proof, not of substantive procedure. While individual acts of discrimination may exist even in the absence of a "pattern and practice" of discrimination, that does not determine the *vehicle* for litigating ones' claims. *Here*, these Petitioners elected not to pursue their claims individually, but to join in the class action. They were not denied their *right* to pursue their claims individually. In fact the Notice advised them of that right. But, *they* elected not to pursue their claims in that manner, but to pursue them as class members in the class action.

Petitioners accuse the Bank of "thwarting" their efforts to pursue their individual claims. [Pet. Br. 12]. In fact, it was Petitioners themselves who "thwarted" their right to an individual suit by elec-

ting not to exercise that right. The class action Complaint was filed by four intervenors in 1977. Upon Petitioners' consent, the *EEOC and Cooper* action was conditionally certified as a class action in April 1978 pursuant to both Rule 23(b)(2) *and* (b)(3). [J.A. 30a]. When the district court conditionally certified the class, it required that a Notice be sent to each class member. Each of these Petitioners actually received the Notice. [J.A. 95a]. The Notice informed Petitioners that they would "be bound by the determination in this action" unless they excluded themselves from the class, and that if they opted out of the class they would not be bound by the decision in the class action.[12] Petitioners did not opt out of the class action; nor did they seek to intervene in it as named parties (prior to the

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[12] The Notice stated in pertinent part:

> 3. The class of persons who are entitled to participate in this action as members of the class represented by the plaintiff-intervenors, for whom relief may be sought in this action by the plaintiff-intervenors and who *will be bound by the determination in this action* is defined to include: all black persons who were employed by the Federal Reserve Bank of Richmond at its Charlotte Branch Office at any time since January 4, 1974.
>
> 4. ... if you so desire, *you may exclude yourself from the class* by notifying the Clerk, United States District Court, as provided in paragraph 6 below.
>
> 5. If you decide to remain in this action, you should be advised that: the court will include you in the class in this action unless you request to be excluded from the class in writing; *the judgment in this case, whether favorable or unfavorable to the plaintiff and the plaintiff-intervenors, will include all members of the class; all class members will be bound by the judgment or other determination of this action* ....
>
> 6. If you desire to exclude yourself from this action, *you will not be bound* by any judgment or other determination in this action and you will not be able to depend on this action to toll any statutes of limitations on any individual claims that you may have against the defendant ....

[J.A. 35a-37a (Emphasis added)]. Petitioners raise a question about the adequacy of this Notice. However, the Notice tracks the language of Rule 23 itself. Moreover, Petitioners' counsel consented to the Notice in the Consent Order. [J.A. 24a].

adverse ruling as to their class). Instead, they elected to pursue their claims as class members and actually testified in support of the class action.

Binding Petitioners to the adverse judgment in the class action is particularly appropriate in this case because:

- —Petitioners had never filed charges of discrimination with the EEOC;
- —they were given notice of the opportunity to pursue their claims as individuals when the class was certified *two years* prior to trial;
- —they never moved to intervene in the class action even though their counsel had intervened on behalf of four other individuals and the Bank had not opposed that intervention;
- —their counsel consented to a bifurcated trial of the class action;
- —they first "appeared" in the class action on a witness list filed four days prior to the trial, but did not attempt to intervene even then;
- —they appeared and testified at the trial of the class action, but made no attempt to intervene—even after the district court stated that it would not make a determination of their personal claims; and
- —they made no attempt to assert their personal claims until *four months* after they learned that their class had lost the class action.

As class members in the previous class action, these Petitioners received notice of the proceedings and were given the option of pursuing their claims via the class action or opting out of that action and pursuing them individually. The Notice spelled out the fact that they would be bound by the judgment in that action "whether favorable or unfavorable" unless they opted out of the class action. With that knowledge, Petitioners elected to pursue their claims as class members in the class action. The class action judgment was adverse to their class. Accordingly, Rule 23 requires that Petitioners be bound by their election.

c. *The Practical Effect of Petitioners' Assertion*

The practical effect of Petitioners' submission would destroy the class action as a vehicle for litigating multiple claims and would effectively erase Rule 23 from the Federal Rules of Civil Procedure.

Petitioners' submission is simple: after an adverse decision in a class action — that the Bank did not discriminate in promotions in Grade 6 and above — Petitioners can nevertheless pursue their "individual claims" that they had been discriminated against in promotions in Grade 6 and above. If these Petitioners can pursue such an action, so can each and every one of the 300 or so other class members.[13] And, after prevailing on the merits of the class action, the Bank may face "individual" suits by each and every class member.

If Petitioners' assertion is the rule, then the practical result is that no purpose is served by Rule 23 and the class action. Although Petitioners assert that they do not seek "one-way intervention," that is precisely the result of their submission. Petitioners' rule would permit them to participate as non-named class members in the class action (as they did) and: (i) if they won the class action, obtain a *presumption* of discrimination[14] in their favor; and (b) if they *lost* the class action, *still maintain* their "individual claims" for relief. What Petitioners suggest is a "no lose" situation that any litigant would envy. It makes the class action a no-risk situation for plaintiffs

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[13] The tolling effect of the class action, *American Pipe*, 414 U.S. 538 (1974), if added to the three-year limitations period for § 1981 actions, N.C. Gen. Stat. § 1-52, may render the potential claims of each class member still vital, even though the claims are possibly 10 years old. Of course, if, as Petitioners assert, the "individual claims" were not part of the class action, then the class action should not toll the running of statutes of limitations and those claims may be barred on that account.

[14] In the trial of a bifurcated class action, Stage I of the trial determines liability. If a pattern and practice of discrimination is demonstrated in Stage I, each class member receives a rebuttable presumption that he is a victim of that discrimination and is presumed to be entitled to relief in Stage II of the proceeding. *See Teamsters v. United States*, 431 U.S. 324, 359-362 (1977).

and a no-win situation for the defendant — since even if the defendant prevails on the merits in the class action, the class can roll on "individually."

Petitioners suggest that the Fourth Circuit's decision will force all class members to intervene in the class action.[15] Multiple intervention is a false fear because there are many good reasons for class members to elect to litigate their "individual claims" as class members — as Petitioners did. First, a class member's chances of winning relief are probably greater in a class action than in an individual suit. The pattern and practice class action has proved to be an effective and successful device for plaintiffs in employment discrimination cases. Methods of proof — such as the "pattern and practice" proof scheme and statistical proof — may be available in a class action that would not be probative in an individual action. The cumulative effect of multiple claims may have greater impact than an individual claim. And, once successful in Stage I of the class action, each class member receives a valuable *presumption* of entitlement to relief that may convert a losing claim into a winning one. Second, there are real economic advantages to litigating one's "individual claim" as a class member. This Court has noted that "a central concept of Rule 23" is that a class member has access to the pooled resources of the entire class, and the costs of litigation are shared among the entire class. *Deposit Guaranty National Bank v. Roper*, 445 U.S. at 338 n.9. In this very case, for example, Petitioners — as class members — were represented by three lawyers and as many paralegals and had the benefit of an expert statistician who performed analyses and testified at the trial (for $50,000.00).[16] An individual employee certainly could not muster that kind of support for his "individual claims" in an individual action. Thus, there are real, practical benefits for class members who elect to litigate their claims as a class member in a class action.

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[15] Of course, if class members are permitted to pursue "individual claims" after an unsuccessful class action as Petitioners suggest, then it would behoove the *defendant* to move the court to join all the class members as named parties in order to obtain a binding judgment against them.

[16] *See*, Motion for Attorneys Fees and supporting Affidavits filed in the Record of the district court in *EEOC and Cooper*.

Petitioners' proposition is also inherently inconsistent. It would permit each and every one of the 300 passive members of the *EEOC and Cooper* class to file individual suits against the Bank despite the district court's conclusion that the Bank did not discriminate as to promotions in Grade 6 and above. This is simply "massive intervention" of a different type. Surely the prospect of 300 individual suits against the Bank, filed at various times and perhaps in various forums, is much worse than requiring that all class members' claims be managed and adjudicated by the district court in one proceeding.

Petitioners' suggestion that, under their rule, a defendant would benefit by class members not being able to assert a "pattern and practice" of discrimination as evidence in subsequent "individual" actions is similarly unsound. The purpose of Rule 23 and the class action device is not to establish a rule of *evidence*. The Bank certainly cannot be expected to defend this action for over six years — at great expense — just to eliminate one piece of evidence from multiple subsequent individual actions. In fact, this assertion demonstrates the illogic of Petitioners' position. Their position — by their own submission — would reduce a class action into nothing more than an evidentiary ruling. Such a result is certainly not contemplated by Rule 23 and is wholly illogical.

The purpose of Rule 23 and the class action is to avoid needless multiplicity of suits and to adjudicate numerous claims in one suit. If this purpose is to be effected, the judgment in the class action must be binding on class members.

d. *Other Decisions of this Court Involving Rule 23*

The decision of the Fourth Circuit barring Petitioners' subsequent action is consistent with other decisions of this Court involving class actions. It fits well within the framework of this Court's other decisions involving Rule 23. In fact, the result here has been suggested in other decisions of this Court.

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Court held that the pendency of the class action tolled the running of statutes of limitations on class members' right to intervene in the action as individuals after denial of class certification.

414 U.S. at 553. That principle was recently applied to class members' rights to file separate actions. *Crown, Cork & Seal Co. v. Parker*, 76 L. Ed. 2d 628 (1983). However, both of those cases dealt only with the tolling of limitations periods pending *class certification*. In both of those cases class certification was *denied*. Putative class members were freed to file individual actions because there was no judgment in the class action. In contrast, in this case the class was certified and there was a judgment on the merits in the class action. So, the fact that the limitations periods for individual actions by class members may have been tolled during the pendency of the putative class action is consistent with extinguishing the right to an individual action by the adverse class action judgment on the merits. In fact, *American Pipe* actually noted that Rule 23 had been amended to prevent the "one-way intervention" Petitioners seek to accomplish here. 414 U.S. at 547-49.

In *General Telephone Company v. EEOC*, 446 U.S. 318 (1980), this Court held that the EEOC could seek relief for a group of aggrieved individuals without certification as a class representative pursuant to Rule 23. The Court noted that one effect of the ruling was that the individuals would *not* be bound by the relief obtained by an EEOC judgment or settlement. 446 U.S. at 333. But, in the course of discussing that result, the Court suggested that the result would be different in a private class action certified pursuant to Rule 23. This Court noted that: "We are sensitive to the importance of the res judicata aspects of Rule 23 judgments. . ." 446 U.S. at 332.

The Fourth Circuit's decision that Petitioners are bound by the adverse judgment in the prior, private class action is consistent with the language and intent of Rule 23 and with the decisions of this Court. Further, it follows the result suggested in *General Telephone*.

II. The Bank Did Not Acquiesce In Subsequent Individual Actions And The District Court Did Not Authorize Subsequent Actions

Petitioners' assertion that the Bank acquiesced in or acknowledged Petitioners' right to pursue individual claims in subsequent suits is misleading. In the course of opposing intervention in the class action after the trial, the Bank's counsel, relying on certain

portions of *dicta* in *Dickerson v. United States Steel Corp.*, 582 F.2d 827 (3d Cir. 1978), did state Petitioners might file a subsequent action.[17] But, the Record is clear that the Bank's position throughout was that Petitioners' individual claims were barred by *res judicata*.

For example, at the hearing on Petitioners' Motion to Intervene, the Bank's counsel stated its position in the following manner:

> MR. HODGES: The problem, Your Honor, is that these people chose to participate in this case as class members, and in a class action the judgment of the Court is that their part of the class should receive no relief, so they are not entitled to proceed any further. They have a judgment entered against them on the part of the class. [p. 4].
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> * * * * *
>
> MR. HODGES: That's right, and they could go file charges with the EEOC, file a case under 1981, but they could not participate any longer in this case. They are not entitled simply to go into Stage 2 to pursue their claims. They've got to do what any other Plaintiff with a complaint has got to do and that is to go through the proper procedure. They are people that actually showed up in this case about a week before trial and just happened to come in and testify, and I don't believe that gives them any additional status than any of the other class members in Grades 6 and above would have. *They are bound by the judgment against them.* [p. 8].
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> * * * * *
>
> COURT: You're unnecessarily complicating the possibility of getting an ultimate decision on the merits by skipping what would ordinarily be normal procedure.

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[17] Petitioners' selective quotation of statements made at the hearing on their Motion to Intervene appears to imply that counsel misled the district court about the Bank's position. Actually, if the district court was led into an erroneous conclusion about Petitioners' right to file a subsequent action, it was by the statements in *dicta* in *Dickerson* and not any statements by counsel.

MR. HODGES: Your Honor, that doesn't avoid the problem that you've got that they should have a judgment entered against them as they are part of a class. [p. 10].

* * * * *

MR. HODGES: The Third Circuit decided otherwise. They said the intervention of class members would prejudice the Defendant severely. From the outset this lawsuit was tried as a class action, based primarily upon the allegations of across the board discrimination. That's exactly the case here. There's no reason to give these Plaintiffs a second bite out of the apple in this case. Stage 2 proceedings are for the successful class members, not the unsuccessful. Otherwise why have a Stage 1 proceeding. [p. 17].

* * * * *

MR. CHAMBERS: As to the class. *If the Court follows that reasoning, it would say that the individuals now are barred by res judicata.*

MR. HODGES: *That's exactly what they [sic] ought to do.* [p. 19-20].

[Citations are to the transcript of the hearing on Petitioners' Motion to Intervene, May 8, 1981, which has been filed in this Court with the Joint Appendix (Emphasis added)]. The Bank clearly did not acquiesce in or agree to Petitioners' subsequent action. Rather, the Bank's position was that it was entitled to a judgment against Petitioners and any subsequent actions would be barred by *res judicata*. Consequently, when the subsequent action was filed, the Bank moved that it be dismissed on that basis.

Petitioners' assertion that the district court authorized the subsequent action misapplies principles relating to splitting claims and misconstrues what the district court actually did. Restatement (Second) of Judgments § 20 (1)(b), by its terms, applies only where the plaintiff is "nonsuited" or his claims "dismissed" without prejudice. Here, there was a judgment *on the merits*. Plus, all that was "dismissed" was their Motion to Intervene — not a prior action as

contemplated by the Restatement. The assertion that the district court "expressly reserved" Petitioners' right to maintain a second action misapplies Restatement (Second) of Judgments § 26. That applies only where causes of action are "split" and the claims "reserved" are omitted from the first action. It does not permit "reservation" of claims included in the first action such as is the case here — especially *after* a decision on the merits has been announced. *See* Restatement (Second) of Judgments § 26 comment b. Moreover, the district court here did not "expressly reserve" any rights. In the Order denying intervention the district court merely expressed an opinion that the Petitioners *might* be able to pursue a separate action:

> *I see no reason why*, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week . . . All motions for leave to intervene are thus denied without prejudice to any underlying rights the intervenors *may* have.

[P.A. 288a-289a (Emphasis added)]. The Restatement exception applies to *express* reservations of rights, not to advisory comments about possible rights as the statement above. Consequently, there was no reservation of rights by the district court nor acquiescence by the Bank as to Petitioners' subsequent action.

II. The Claims of Petitioner Harrison

Both courts below stated Petitioner Harrison to be a Grade 3 employee. But, in fact, Harrison was at all times a Grade 6 employee. The Bank has furnished counsel for Petitioners portions of Harrison's employment records, all of which confirm that he was a Grade 6 employee.[18] Accordingly, counsel for Petitioners has advised the Bank that they have withdrawn their assertions based upon the erroneous statements of the courts below that Harrison was a Grade 3 employee. [Pet. Br. 53-56]. Thus, the parties now agree that Harrison's position is the same as the other Petitioners, and the Bank makes no substantive response to the assertions regarding Harrison.

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[18] Harrison's job Grade was not a significant issue at this trial, so there is little in the actual Record regarding his Grade. Harrison testified first that he was a Grade 3 but when asked if he was not actually a Grade 6, he said he did not know. [I C.A. App. 537, 540]. The Record also contains a group of job descriptions [DX 70] which shows that Harrison's job of "stock clerk" (he called it "supply clerk" [I C.A. App. 537]) was a Grade 6 job. [DX 70 page 5-291].

CONCLUSION

For the reasons stated above, the Bank submits that the rule this Court should adopt is that: a properly certified class action is made up of the "individual claims" of class members, and those class members who, after notice, elect to litigate their claims in the class action are thereafter precluded from re-litigating individual claims within the range of issues determined in the class action. Consequently, the decision of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted this 26th day of January, 1984.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served other parties in this action by causing three copies each of the foregoing Brief for Respondent Federal Reserve Bank of Richmond to be deposited in the United States Mails, postage prepaid and properly addressed to:

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/s/ George R. Hodges

George R. Hodges